APPENDIX A.

Supreme Court of the United States.

No. 948, October Term, 1967.

Cyrus Higginson, Etc.,
Petitioner,

vs.

United States.

Order.

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for rehearing in the above-captioned case be, and the same is hereby, extended to and including April 26, 1968.

/s/ Potter Stewart,
Associate Justice of the Supreme Court of the United States.

Dated this 19th day of April, 1968.

APPENDIX B.

EXHIBIT "E" TO BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A NEW TRIAL AND TO AMEND THE JUDGMENT.

Warranty Deed.

This Deed made and entered into this 6th day of March, 1943, between Leslie Tapp, unmarried, and Byron Tapp & Louise Tapp, his wife, parties of the first part, and the United States of America, party of the second part: Witnesseth, that said parties of the first part, for and in consideration of the sum of Two Thousand Five Hundred and no/100 Dollars ($2,500.00), the receipt of which is hereby acknowledged, do hereby sell and convey to party of the second part, its successors and assigns forever, the following described real estate lying in Webster County, Kentucky, viz.:

Beginning at a point in the center of the Highland Creek Ditch, corner to Clarence Tapp; thence with the line of Chester Ramsey and Y. M. Gibson S 37° 45′ W 78 poles to a point in the line of R. L. Higginson; thence with his line S 55° 20′ E 4 poles; thence S 14° 25′ W 132.5 poles; thence with the line of R. L. Higginson and Rose Bridwell and Cates Branch S 68° 30′ E 29 poles to a corner of Robert F. Tapp; thence with his lines and the center of Cates Branch N 05° E 9 poles; thence the following courses with Cates Branch N 39° 06′ W 12 poles; thence N 06° 26′ E 5.5 poles; thence N 88° 26′ E 6 poles; S 52° 05′ E 13 poles; thence N 83° 35′ E 4.5 poles; thence N 46° E 15 poles; thence S 89° 15′ E 10.5 poles; thence N 13° 40′ E 8.5 poles; thence N. 61° 25′ E 6.5 poles; thence N 20° E 8.5 poles; thence S 76° 25′ E 11 poles; thence N 26° E 16 poles; thence S 75° 15′ E 6 poles; thence N 31° 20′ E 5

poles; thence N 02° 55′ W 19.5 poles; thence N 65° 40′ E 6 poles; thence N 28° 20′ E 7 poles to a corner of J. D. Tapp; thence with his lines and the center of Cates Branch the following courses N 07° 20′ W 19 poles; thence N 35° 55′ E 6.5 poles; thence N 12° 40′ W 6 poles; thence N 60° 50′ W 7 poles; thence N 06° 55′ W 9.6 poles; thence N 52° E 10.5 poles; thence N 22° 85′ E 10.5 poles; thence N 10° 36′ W 22 poles to a point in the center of Highland Creek Ditch and Cates Branch, corner to Clarence Tapp; thence with his lines and the center of the Highland Creek Ditch N 51° 20′ W 27 poles; thence N 26° 40′ W 21 poles to the beginning, containing 77.7 acres, more or less.

Leslie Tapp and Byron Tapp, jointly, acquired title to the above described property through the following deed, to-wit: C. D. B. 6, page 47; Deed Book 78, page 312; Deed Book 81, page 587; and Deed Book 78, page 503, all in the Webster County Court Clerk's office.

This conveyance made subject to all oil and gas leases of record that are still in force, also except all coal and mineral rights heretofore conveyed, if any.

The first parties also quit-claim and convey to the second party all of their right, title and interest, if any, in and to any and all of the property adjoining and abutting the above described property.

To Have and to Hold the same with all the appurtenances thereon, to the party of the second part, its successors and assigns forever, with a covenant of "General Warranty."

Witness our hands the day and year above written.

/s/ Byron Tapp.
/s/ Louise Tapp.
/s/ Leslie Tapp.

State of Kentucky, }
County of Henderson. } Sct.

I, Ben M. Strother, a Notary Public in and for the County and State aforesaid, certify that on March 6th, 1943, the foregoing deed was produced before me in my county and acknowledge by Byron Tapp and Louise Tapp, his wife, and Leslie Tapp, unmarried, to be their free act and deed.

Witness my hand this 6th day of March, 1943.

/s/ Ben M. Strother,
Notary Public, Henderson County, Ky.

My commission expires the 3rd day of December 1944.

State of Kentucky, }
County of Webster. } Sct.

I, Susie M. Letzinger, Clerk of the County Court for the County and State aforesaid, do certify that on the 10 day of March, 1943, the foregoing deed was produced to me in my office and lodged for record. Whereupon I have truly recorded the same together with this and preceding certificate in my office.

This 10 day of March, 1943.

/s/ Susie M. Letzinger,
Clerk.
By /s/ Doris Miller,
D. C.

BRIEF AMICUS CURIAE

Office-Supreme Court, U.S.
FILED
MAY 21 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of the Commonwealth of Kentucky as Amicus Curiae.

MERRITT S. DEITZ,
State Capitol Building,
Frankfort, Kentucky 40601,
Attorney for Amicus Curiae,
The Commonwealth of Kentucky.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of the Commonwealth of Kentucky as Amicus Curiae.

The Commonwealth of Kentucky, on behalf of Cyrus Higginson, Petitioner herein, and on behalf of approximately 5,000 other former landowners, or heirs, successors and assigns thereof, of 36,000 acres, namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky, and on further behalf of the citizens of this Commonwealth, files this Brief as Amicus Curiae urging this Court to grant the Petitioner's Petition for Rehear-

ing, to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, and to grant the relief heretofore requested by the Petitioner in his Motion for Leave to file said Petition for Rehearing.

INTERESTS IN THE AMICUS CURIAE.

The interests of the Commonwealth of Kentucky in the above-styled proceedings can be simply stated.

First, it is the conviction of the Commonwealth of Kentucky that the Petitioner's remedies and procedural steps which were once available to them in order to present their grievances to the Courts have been completely obliterated by the groundless and erroneous decisions dealt to them by the District Court and the Court of Appeals. The erroneous decisions rendered by the Federal District Court and the United States Court of Appeals for the Sixth Circuit (hereinafter sometimes referred to as the lower courts) have deprived the Petitioners of their property without due process in contravention of the Fifth Amendment to the Constitution of the United States.

Secondly, the lower courts have decided an important state or territorial question in such a way as to be in direct conflict with the applicable laws of this State relative to an exception or reservation of minerals from a grant being effective even though an untrue circumstance is recited in relation to, or as the reason for, the excepted interest. If the unqualified decisions rendered by the lower courts are permitted to stand, the entire economical structure and welfare of the Petitioner, the citizens of this Commonwealth, and the mineral industries could be in serious jeopardy.

The Court of Appeals in affirming the District Court's decision, in essence decreed that the Federal Government had obtained a fee simple interest in and to the property

in question, without taking into consideration the undisputable fact that a majority of the land was acquired through voluntary negotiations, which involved the exceptions and reservations of all mineral rights to the landowners. Said exceptions and reservations contained in the deeds read:

> *"This conveyance made subject to all oil and gas leases of record that are still in force, also except all coal and mineral rights heretofore conveyed, if any."* (Emphasis added.)

An example of the General Warranty Deeds from the former landowners to the United States of America containing the above exception and reservation of all coal and mineral rights is appended to this Brief (App. A, p. A-1).

It is a settled rule of law in the Commonwealth of Kentucky, that the above language in a deed or grant creates such an effectual exception or reservation of minerals so as to exclude them from the conveyance even though the minerals have not been previously sold or leased. **Bolen v. Casebolt,** 66 S. W. 2d 19, 252 Ky. 17; **Gibson v. Sellars,** Ky., 252 S. W. 2d 911, 37 ALR 2d 1435; **Bartley v. Rowe,** Ky., 343 S. W. 2d 140; **Brown v. Brown,** Ky., 404 S. W. 2d 286 (1966); **Noffsinger v. Brown,** Ky., 408 S. W. 2d 436 (1966).

There are hundreds of thousands of acres involving minerals in the Commonwealth of Kentucky where the title in and to the minerals is dependent solely upon clauses either identical or similar to the ones contained in the deeds from the Petitioners, and which said clauses under the law of Kentucky are effectual to exclude or retain the minerals. The decisions rendered by the lower courts in the above-styled cause have placed a reflection of uncertainty, in all probability, upon the once clear interpre-

tation of what constituted an exception or reservation of minerals in this State. In other words, the lower courts' decisions have now created confusion, chaos and a questionable cloud upon titles to minerals originating through exceptions and reservations.

The mineral industry constitutes one of the principal sources of commerce and revenue for the Commonwealth of Kentucky and its citizens. In 1964 alone, Kentucky's mineral production was valued at $444,379,000. And in that same year Kentucky ranked second among the states in the production of bituminous coal, ball clay, and fluorspar; fifteenth in the production of oil; fourteenth in the production of natural gas; and the proven recoverable crude oil reserves in Kentucky, as of December 31, 1964, have been estimated at 118 million barrels by the U. S. Bureau of Mines. **Natural Resources of Kentucky**, Kentucky Department of Commerce (1967), pp. B-2, B-8, B-11.

The mineral industry, businessmen planning to invest in land, and the citizens of this State must be reasonably assured that what interest is acquired in real property either purchased, or taken, relative to condemnation proceedings, by the federal government will be that same interest acquired if the property had been instead purchased, or taken, by the State of Kentucky. Persons or industries dealing in land within this State (or, as a practical matter, any other state) must conduct themselves in the light of this State's law covering real property, which law will inevitably govern most of their transactions. Needless to say, any such business will be deterred if they also have to take cognizance of a purported federal property law, and especially the decisions rendered by the lower courts, that would apply only in the uncommon event of a federal condemnation for the purpose of establishing a temporary military training camp during the period of a war emergency.

What is not of record but which is of far greater significance is the circumstance that the opinions of the lower courts, if permitted to stand, will reach into property arrangements, mineral rights, and the ownership of property across all of Kentucky, and said opinions will stand as forceful and compelling precedents for the abrogation of existing exceptions and reservations of minerals, and the unconstitutional impairment of the obligation of contract. Essentially, the once applicable and controlling laws of this Commonwealth which secured the ownership and title to both mineral rights and surface rights has now taken on an uncertain application. This is the real and present hazard which this case presents and which the Commonwealth of Kentucky as Amicus Curiae argues urgently for the issuance of this Court's Writ.

Therefore, in order to protect the mineral industry, and its citizens, the Commonwealth of Kentucky under the provisions of Rule 42 (4), by and through the law officer authorized therefor, pursuant to KRS 11.070 and KRS 12.210 (App. B, p. A-4), does hereby file this Brief as Amicus Curiae in support of the Petitioner, Cyrus Higginson, and on the further behalf of approximately 5,000 other former landowners.

ARGUMENT.

I.

Persons, Industries, and All Other Citizens of This Commonwealth, in Addition to the Petitioners, Will Be Deprived of Their Property Without Due Process and in Contravention of the Fifth Amendment, if the Decisions of the Lower Federal Courts Are Permitted to Stand.

1. The United States Government acquired only the interest in the property in question as was needed for the establishment of a military camp.

The law of Kentucky is well developed on the point herein involved and it clearly indicates that the description in a declaration of taking in a condemnation proceeding is not dispositive of the issue but that a more involved analysis of the entire transaction is called for.

The Federal Government contends that a fee simple title was acquired by the United States in as much as some of the declarations of taking purportedly stated that the estate taken was a full fee simple title. This contention by the Federal Government serves merely to present the questions or issues involved—and not to answer them. This proposition by the amicus curiae is evidenced by the fact, notwithstanding the condemnation proceedings, a vast majority of the land in question was acquired by the United States from the former land owners through the means of General Warranty deeds which specifically excepted and reserved all mineral rights (App. A, p. A-1).

It is unequivocal, under the applicable and controlling law of this Commonwealth, that the exceptions or reservations of all mineral rights as contained in the deeds

from the former land owners were effectual to exclude all minerals from the conveyances even though the minerals had not been previously sold or leased. In the case of Bartley v. Rowe, Ky., 343 S. W. 2d 140, the Kentucky Court of Appeals stated:

> "*. . . The fact that none of the minerals actually had previously been conveyed does not prevent the exception from being effective.*"

The definition of an exception is adequately stated in 23 Am. Jur. 2d, Deeds, Sec. 264:

> "*An exception of a specific part of the subject matter of the grant is effectual to exclude it from the grant notwithstanding an untrue circumstance is recited in relation to the excepted part.* Thus, where the grantor 'reserved', that is, excepted, numbered lots from his grant as 'sold', it has been held that all the lots were excepted although some had not been sold. *Similarly, the validity of an exception of minerals and mineral rights previously conveyed is in no way dependent on the validity of the prior instrument as a conveyance.*" (Emphasis added.)

As demonstrated by the Federal Government's own acts, and by the proper application of the applicable law of this state, it is unquestionable that the United States did not acquire an interest in and to the mineral rights underlying the lands of Camp Breckenridge, Kentucky.

The respondent in a footnote, page 1 of their Memorandum in Opposition, stated that:

> "In a few instances, the United States acquired these lands subject to outstanding oil and gas leases, but those interests were later condemned."

This amicus curiae feels that the Federal Government, by inserting said statement, purposefully attempted to

mislead this Court into the belief that the condemning of these purported leasehold interests had the effect of acquiring the above mentioned mineral rights which had been excepted, reserved and retained by the Petitioners. It would be an absurdity to contend that the condemning of interests in an outstanding oil and gas lease would have the effect of acquiring any interests in and to the separate mineral estate which was created by virtue of the exceptions and reservations. **Saulsberry v. Maddix,** 125 F. 2d 430 (6th Cir. 1942).

The excepting and reserving clauses contained two separate provisions, each having a different and unrelated affect upon the interests involved. The two separate provisions were: *(1) This conveyance made subject to all oil and gas leases of record that are still in force; (2) also except all coal and mineral rights heretofore conveyed, if any.* Each of the two restrictions are completely independent of the other, and either one without the inclusion of the other would have had, and did have, the effect of excluding from the conveyances the particular mineral covered by each individual exception and reservation. For example, if the provision relating only to the oil and gas leases had been present without the provision excepting all coal and mineral rights then under such circumstances only the oil and gas would have been excluded from the deeds. The affect is different, however, by virtue of the grants containing the clause relating to the exception of all coal and mineral rights, inasmuch as by reason of that restriction alone all coal, mineral rights, oil and gas, and all other minerals of whatever type and nature would have been, *and were, effectively excluded and retained by the former landowners.* Thus, by reason of the particular wording used in said clauses all of the coal and mineral rights were excepted and reserved regardless of any oil and gas leases that might have been enforced at the time the deeds were executed.

And it is an affirmed rule under both state and federal law that the term "minerals" includes oil and gas as well as solid minerals. This Court stated in **Northern Pacific R. Co. v. Soderberg**, 188 U. S. 526, 23 S. Ct. 365, 47 L. Ed. 575, that the words mineral deposits included all lands chiefly valuable for other than agricultural purposes, and particularly as included non-metallic substances, among which are petroleum. *And this Court squarely held that the term mineral included gas and oil* in **Burke v. Southern Pacific R. Co.**, 234 U. S. 669, 34 S. Ct. 907, 58 L. ed. 1527.

The United States in acquiring the vast majority of the lands through individualized, open and voluntary negotiations did not seek, did not pay for, and did not acquire the mineral rights in and to said property.

2. The terms and conditions agreed upon by the government and the landowners in federal condemnation proceedings are controlling and binding upon the government.

It is uncomprehendable to the Amicus Curiae, under any conceivable reasoning, as to how the United States could acquire *what it did not wish, did not seek, and did not pay for.*

This Court has consistently held that when the government condemns land the terms, conditions and consideration, when agreed upon by the government and landowner, become controlling and binding upon the federal government as well as the landowner. **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240; **United States v. Bethlehem Steel Corp.**, 315 U. S. 289, 62 S. Ct. 581, 86 L. Ed. 855; **United States v. Two Acres of Land, etc.**, 144 F. 2d. 207 (7th Cir. 1944).

3. State interests, in regard to property arrangements, and particularly in regard to the state's legal interpretation relative to title and ownership of property including exceptions and reservations of specific interest should not be overridden by the federal courts.

If the lower Federal Courts, or any other court, can ignore the stipulated facts, the clear and unequivocal language of a contract or deed of conveyance and find in consequence that the agreement or deed of conveyance means something other than it plainly states, the sanctity of contract and property rights which the federal Constitution insures is rendered meaningless.

It is the proposition of this Amicus Curiae, and on behalf of the citizens of this Commonwealth, that this Court, in the absence of specific congressional action, cannot, under all of that which is equitable and just, decree to the federal government a preferred right which would require overriding a state law dealing with the intensely local interest of real property and the protection of past and future purchasers of property within the state.

The Commonwealth of Kentucky, as each other state, has its own peculiar and complex property arrangements, and its own laws governing real property, which are tailored to fit the specific and individualized needs of this state. *There is no federal law, known to the Amicus Curiae, relating to exceptions and reservations of mineral interest when there has been a separate conveyance of the surface. And it is urged that this Court should not here invent one and impose it upon the Commonwealth of Kentucky, its inhabitants, and upon the commerce and industries which provide each and all the necessary monetary requirements.*

This Court in a recent case, which could not by any possible standards involve the substantial interest present in

this cause, *held that the United States could not by judicial fiat and with total disregard of state laws relative to property arrangements devise a federal doctrine of real property which would override the already developed law of the state when the interest of the national government will not suffer major damages.* **United States v. Yazell,** 382 U. S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404.

Unquestionably, the interest in and to the minerals underlying Camp Breckenridge, Kentucky, were not acquired by the federal government. *The decisions rendered by each of the lower courts, however, erroneously failed to make any findings whatsoever relative to the minerals retained by the former landowners.* These decisions regardless of any specific mentioning of the minerals will be determinable of the question presented by this Amicus Curiae, and as a consequence thereof the rights and interests of the Petitioners, citizens of this state, and the various industries will be irrevocably determined by these decisions, or the decision of this Court.

II.

The United States Did Not Acquire a Fee Simple Interest in the Land—and Any Holding to the Contrary Will Effectuate an Unconstitutional Taking of Petitioners Property.

1. The Commonwealth of Kentucky knows the application of its own laws better than the federal courts do!

The Amicus Curiae cannot let go unnoticed the finding by the Court of Appeals, that even if Kentucky law applied, the United States would still have obtained a fee simple title. This finding by the Court of Appeals represents an incorrect and untrue statement of the applicable and proper principle of law in this Commonwealth. And this Amicus Curiae feels that it knows its own laws and

their application better than the federal court, or any other court.

An extensive amount of time, money, and work has been expended by the Amicus relative to the laws of Eminent Domain proceedings in this state. And the accurate rule of law, contrary to what the Court of Appeals found is:

> "*It is well settled that when land is taken for a public use unless a fee is necessary for the purposes for which the land is taken or the statute expressly provides for the acquisition of the fee, the public acquires only an easement.* The public easement or servitude extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired and to no others, and the owner retains the title to the land in fee and the right to make any use of it that does not interfere with the full and free exercise of the public easement. 18 Am. Jur. 741, Section 115. To the same extent in 3 Nichols On Eminent Domain 278, Section 9.2 (4). See McGee v. City of Williamstown, 308 S. W. 2d 795 (1957), in which the Court stated that it is a settled rule of law in this state that a deed executed pursuant to a condemnation proceeding ordinarily conveys an easement in the condemned property. *The Court held that although the commissioners' deed executed pursuant to the proceedings by the city to condemn land for water supply purposes purported to convey a fee simple title, the words of the deed were not controlling, and the condemnor acquired only an easement.*"

Schwab, **Eminent Domain Procedure**, Legislative Research Commission (1965), p. 75.

And the above proposition of this Amicus was pronounced more strongly by Professor Richardson in his works entitled **Kentucky Practice** (2d ed., 1968), Sec. 479, pp. 557-558:

"Though as stated, a fee simple title may under certain circumstances be taken by the condemnor, such intent must be clearly shown, *and it would seem that necessity for such title must be apparent.* This supposition follows from the rule that condemnation statutes are strictly construed, and that where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. *A warranty deed conveying 'right of way' in fee simple to a railroad company in* consideration of the construction of railroad tracks thereon and operation of a railroad and the additional consideration of one dollar, *was held to convey an easement and not a fee simple title, so that upon abandonment of the railroad the land reverted to the grantor or its successor in title. The court in this case was of the opinion that an unconditional conveyance for a specific purpose, namely, right of way, did not convey the fee, and there was an abandonment where the company removed its tracks and attempted to sell the right of way.* Here the intention of the parties and the consideration were of weight in the decision reached.

"It is a fundamental rule of eminent domain that property acquired for a certain purpose may not be diverted to another use by the condemnor. If the new use is of entirely different character, the public easement is lost."

By reason of the foregoing cited authorities, it is obvious that the Court of Appeals *jumped before they looked.* Regardless, however, of the errors committed below, and there were many, it is respectfully requested that this Court now correct those irregularities and render an adequate and just decision.

CONCLUSION.

The Commonwealth of Kentucky as Amicus Curiae, and for the reasons set out in this Brief, and for the reasons assigned by the Petitioner in his Motion for Leave to File Petition for Rehearing, for the reasons designated in his Petition for Rehearing and Petition for Certiorari, all of which are adopted as additional grounds by the Amicus, respectfully urges that this Court grant Petitioner's Petition for Rehearing, to grant Writ of Certiorari, and to remand his cause to the Court of Appeals with directions to vacate its judgment and to remand the cause to the District Court for further proceedings.

The Commonwealth further requests that this Court apply the equitable rule that was expressed by the Court in granting a Petition for Rehearing upon the application of an Amicus Curiae in **Green v. Biddle**, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

Respectfully submitted,

MERRITT S. DEITZ,
State Capitol Building,
Frankfort, Kentucky 40601,
Attorney for Amicus Curiae,
The Commonwealth of Kentucky.

APPENDIX.